Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

LOWELL RUSSELL PUGH, JR.,
Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals
For The Fifth Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

I.

WAS PETITIONER IMPROPERLY DENIED CONSIDERATION OF HIS FEDERAL HABEAS CORPUS PETITION BY THE COURT OF CRIMINAL APPEALS' WITHOUT FIRST GRANTING A CERTIFICATE OF APPEALABILITY WITH A LIMITED REMAND TO DETERMINE WHETHER THE PETITIONER WAS AWARE OF THE ANTITERRORISM AND EFFECTIVE DEATH PENATLY ACT ("ADEPA") AND ITS ONE YEAR STATUTE OF LIMITATIONS PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS WHEN THE FACTUAL RECORD DID NOT ADEQUATELY EXPLAIN THE REASON THE PETITIONER CLAIMED A LACK OF AWARENESS OF THE FILING DEADLINES.

LIST OF PARTIES

All parties in the underlying appeal are set forth in the caption of this matter.

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TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for a Writ of Certiorari To
The United States Court of Appeals
For The Fifth Circuit

TO THE UNITED STATES SUPREME COURT:

Lowell Russell Pugh, Jr. (hereinafter "Petitioner"), petitions for a *writ of certiorari* to review, reverse and vacate the judgment of the United States Court of Appeals for the Fifth Circuit wherein Petitioner's application for certificate of appealability (COA) to appeal the district court's dismissal as time-barred a pro se 28 U.S.C. Sec. 2254 application challenging his conviction and 20-year sentence for theft was

denied. He is currently imprisoned at the Coffield Unit within the Correctional Institutions Division of the Texas Department of Criminal Justice.

OPINIONS BELOW

The Judgment of the Court of Appeals was entered on October 24, 2006. (Appendix I).

JURISDICTION

The jurisdiction of this Court is invoked under its review authority under 28 U.S.C. Sec. 1254(1) and Sec. 2101©. The date of the Judgment sought to be reviewed is October 24, 2006. Jurisdiction in the Northern District Court was based on 28 U.S.C. Sec. 2254. Appellate jurisdiction to the Fifth Circuit Court of Appeals was based on 28 U.S.C. Sec. 1291.

APPLICABLE CONSTITUTIONAL, FEDERAL STATUTES, RULES OF THE SUPREME COURT, FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE PROVISIONS

FEDERAL STATUTES

28 U.S.C. Sec. 2244(d)(1) and (2)

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the

conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

This is an appeal from the denial of a COA to appeal the district court's dismissal as time-barred a pro se 28 U.S.C. Sec. 2254 application for habeas corpus challenging Petitioner's conviction and 20-year sentence for theft. Petitioner raised the following grounds in his habeas corpus petition: 1) Petitioner has been held in detention since his arrest without a judicial finding of probable cause, 2) Petitioner suffered an improper revocation of parole or mandatory supervision, 3) Petitioner's conviction was obtained by the actions of a Grand Jury which was unconstitutionally selected and empaneled, 4) Petitioner's indictment was fatally defective, 5) Petitioner's sentence was illegally imposed, 5) Petitioner was denied a speedy trial, 6)

Petitioner's conviction was obtained by the action of a Petit Jury which was unconstitutionally selected and empaneled, 8) Petitioner's conviction was obtained by the Unconstitutional failure of the Prosecution to disclose to Petitioner and his attorney(s) evidence which was favorable to the defense of Petitioner, 9) Petitioner was denied compulsory process, 10) Petitioner suffered from police misconduct and malicious prosecution by the Dallas Police, 11) Petitioner suffered from prosecutorial misconduct and malicious prosecution by the prosecuting attorney(s) of Dallas County, Texas, 12) Petitioner claimed the conviction was improper due to insufficient or no evidence, 13) Petitioner claimed ineffective assistance of counsel, 14) Petitioner's conviction was obtained by the state's use of perjured testimony, 15) Petitioner claimed judicial misconduct, and 16) Petitioner suffered excessive delay in his 11.07 habeas corpus proceedings. **(USCA5, p. 6-86).**

Petitioner's habeas corpus petition was not reached on the merits when it was determined by the district court that the Petitioner had failed to file his habeas corpus petition within one year of the date his conviction became final. Prior to this ruling, Petitioner was given the opportunity to show cause why his petition should not be dismissed as time-barred and he responded by arguing that the limitations period should have been tolled until January 8, 2003; the date on which the factual predicate of the claims presented could have been discovered through the exercise of due diligence, or until February 11, 2003 since he did not have notice or constructive knowledge of the filing requirements of 28 U.S.C. Sec. 1244(d)(1)(A) until that date.

Petitioner, acting pro se, however, failed to set forth any facts upon which he was relying in support of his arguments the statute of limitations should be tolled in this way. In other words Petitioner did not explain why the factual predicate of the claims presented could not have been

discovered prior to January 8, 2003 or why he did not have notice or constructive knowledge of the filing requirements of 28 U.S.C. Sec. 2244 1244(d)(1)(A) until February 11, 2003. Petitioner did, however, seek an evidentiary hearing to address these issues, but was denied such a hearing by the district court.

Pursuant to Slack v. McDaniel, 529 U.S. 472, 484 (2000), the Fifth Circuit Court of Appeals determined that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" and denied Petitioner's request for a COA.

Petitioner contends it was error on the part the Court of Appeals to affirm the dismissal of his habeas corpus application as being time-barred since there was not sufficient facts before the district court to enable it to determine whether Petitioner met the requirements for statutory tolling pursuant to 28 U.S.C. Sec. 2244(d)(1)(B) or was entitled to equitable tolling.

The Court of Appeals should have granted a COA with a limited remand to determine whether the Petitioner was aware of the ADEPA and its one year statute of limitations prior to the expiration of the statute of limitations.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Petitioner, plead not guilty in cause number F98-47946-TI to the offense of theft of property of value greater than twenty thousand dollars and less than one hundred thousand dollars. After a jury trial, Petitioner was found guilty of the offense and sentenced to twenty years in the penitentiary. **(USCA5, p. 96).** He was newly on parole at the time and subsequently had the parole revoked. Petitioner continues to make a claim of innocence.

Petitioner appealed his conviction, and on February 14, 2002 the Eight Circuit Court of Appeals upheld the conviction. Pugh v. State, No. 08-00-00068-CR, 2002 WL 221884 (Tex. App. – El Paso Feb. 14, 2002, no pet.)(not selected for publication.). Petitioner did not learn of the conviction being upheld until March 16, 2002, and did not therefore; file a petition for discretionary review. **(USCA5, p. 121).**

On April 2, 2003, acting pro se, Petitioner filed an application for habeas corpus relief pursuant to Tex. Code of Crim. Proc. art. 11.07. It was denied on October 13, 2004. **(USCA5, p. 91, 97).**

On November 8, 2004 Petitioner filed his federal habeas corpus petition. **(USCA5, p. 97).** Petitioner raised the following constitutional grounds: 1) Petitioner has been held in detention since his arrest without a judicial finding of probable cause, 2) Petitioner suffered an improper revocation of parole or mandatory supervision, 3) Petitioner's conviction was obtained by the actions of a Grand Jury which was unconstitutionally selected and empaneled, 4) Petitioner's indictment was fatally defective, 5) Petitioner's sentence was illegally imposed, 5) Petitioner was denied a speedy trial, 6) Petitioner's conviction was obtained by the action of a Petit Jury which was unconstitutionally selected and empaneled, 8) Petitioner's conviction was obtained by the Unconstitutional failure of the Prosecution to disclose to Petitioner and his attorney(s) evidence which was favorable to the defense of Petitioner, 9) Petitioner was denied compulsory process, 10) Petitioner suffered from police misconduct and malicious prosecution by the Dallas Police, 11) Petitioner suffered from prosecutorial misconduct and malicious prosecution by the prosecuting attorney(s) of Dallas County, Texas, 12) Petitioner claimed the conviction was improper due to insufficient or no evidence, 13) Petitioner claimed ineffective assistance of counsel, 14)

Petitioner's conviction was obtained by the state's use of perjured testimony, 15) Petitioner claimed judicial misconduct, and 16) Petitioner suffered excessive delay in his 11.07 habeas corpus proceedings.. **(USCA5, p. 6-86).**

On January 5, 2005 United States Magistrate Judge William F. Sanderson, Jr., issued an Order Permitting Proceeding in a Case Pursuant to 28 U.S.C. Sec. 2254, Requiring Petitioner to Show Cause With Respect to Statute of Limitations, and Specifying Further Action To Be Taken By the Clerk. **(USCA5, p. 87-88).** Specifically, Magistrate Sanderson found that Petitioner's Petition might be barred by the one-year limitation period provided for under 28 U.S.C. Sec. 2244(d)(1). Magistrate Sanderson further ordered the Petitioner to file a response explaining why the case should not be barred by the one-year statute of limitations or why it should not be tolled on equitable grounds. In a foot note, Magistrate Sanderson specifically asked the Petitioner to provide a statement indicating when and if he had filed a petition for discretionary review, and when it might have been denied or refused, and the date when he filed his habeas corpus pursuant to art. 11.07 Of the Texas Code of Criminal Procedure. **(USCA5, p. 87-88).**

Again acting pro se, Petitioner attempted to comply with Magistrate Sanderson's Order dated January 5, 2005 on January 18, 2005. **(USCA5, p. 89-95).** In said response Petitioner essentially argued that he could not file his Sec. 1254 petition for habeas corpus until his state post-conviction remedies had been fully exhausted, that they were not exhausted until October 13, 2004, and that he had acted with due diligence in filing his Sec. 1254 petition for habeas corpus within three months after his state remedies had been exhausted. **(USCA5, 89-95).** In actuality, Petitioner's Sec. 1254 petition for habeas corpus was filed on November 8, 2004, less than a month after his 11.07 petition for habeas corpus was denied. **(USCA5, p. 97).**

On February 8, 2005 Magistrate Sanderson entered Findings, Conclusions and Recommendations. **(USCA5, 96-99).** Magistrate Sanderson found that Petitioner's petition was filed after April 24, 1996 and was therefore subject to the one-year statute of limitation under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Magistrate Sanderson further found that Pugh's conviction became final on March 16, 2002, thirty days after the Eighth Circuit Court of Appeals upheld his conviction, and that Petitioner had filed his art. 11.07 application on April 2, 2003, more than two weeks after the limitations period had expired. Relying on *Egerton v. Cockrell,* 334 F.3d 433, 435, (5th Cir. 2003) which held that a petitioner's art. 11.07 application did not toll the limitations period when it was itself filed after the one year period. Magistrate Sanderson concluded that the Petitioner had failed to demonstrate due diligence in failing to inquire of either his attorney or the clerk of the appellate court as to the status of disposition of his direct appeal on or before March 3, 2003 when his one-year statute of limitations had expired. **(USCA5, p. 98).**

On February 17, 2005, the Petitioner filed a Written Objection to Magistrate Sanderson's Findings, Conclusions, and Recommendations. **(USCA5, p. 102-110).** The Petitioner did not, however, directly explain why he did not file his art. 11.07 petition for habeas corpus within the one-year limitations period.

On February 22, 2005, United States District Judge Jorge A. Solis signed an order adopting the findings and conclusions of the Magistrate Judge, and entered Judgment that Petitioner's Sec. 1254 petition for habeas corpus was in fact time barred on March 1, 2005. **(USCA5, p. 110-111).**

On March 8, 2005, the Petitioner filed a Supplemental Written Objection. **(USCA5, p. 113-119).** On March 17, 2005, the Petitioner filed an Appeal from the Judgment entered on March 1, 2005 **(USCA5, p. 120-127).**

On March 18, 2005 Judge Solis entered an Order addressing the Petitioner's Supplemental Written Objection which it treated as a Motion for New Trial, and made the finding that the Petitioner had still not set forth grounds showing that his federal petition had been timely filed or that he was entitled to equitable tolling. Specifically, the court complained the Petitioner had failed to address why his state application for habeas corpus had not been filed within a year of his conviction becoming final. **(USCA5, pg. 129-130).**

On March 30, 2005, the Petitioner filed an Objection/Motion to Amend Judgment wherein he stated that he did not have actual or putative knowledge of his claims until the date of January 8, 2003, and that he had not become aware of the new evidence in his case that presented him with the factual predicates of his claims until that time. **(USCA5, p. 132, 135).** The Petitioner further claimed he did not have actual or constructive notice of the filing requirements until the date of February 11, 2003, and that he acted diligently in filing his state petition for habeas corpus by April 2, 2003. **(USCA5, p. 136).** As such, the Petitioner argued the statute of limitations should have been tolled through January 8, 2003, thereby making both his state and federal petitions for habeas corpus timely filed.

On April 14, 2005 the Petitioner made a request for an evidentiary hearing to dispute the factual claims that require development to assess merit of the claims. **(USCA5, p. 145-152).** The Petitioner also filed a Motion for Certificate of Appealability on this date. **(USCA5, p. 153-157).** Both of these pleadings were referred to the magistrate for report and recommendation.

On May 10, 2005, Magistrate Sanderson, rendered his Report and Recommendation finding there was no need to address the pleadings to the extent they related to his appeal already filed and paid for. **(USCA5, p. 160).** Magistrate Sanderson further found the Petitioner had not alleged the

existence of any disputed material facts and was merely arguing that the court erred in dismissing his petition rather than equitably tolling the one-year limitations period. **(USCA5, pg. 160).** As such, the Petitioner's request for evidentiary hearing was denied.

On May 10, 2005, Magistrate Sanderson issued a recommendation that the Certificate of Appealability should be denied as the Petitioner had failed to show reasonable jurists would find it debatable whether the district court was correct in finding that the habeas corpus petition was barred by the statute of limitations. **(USCA5, p. 162).**

On May 10, 2005 Judge Solis adopted the recommendations made by Magistrate Judge Sanderson and denied the Certificate of Appealability. He also denied Petitioner's Motion to Amend the Judgment filed on March 30, 2005. **(USCA5, p. 163).**

On May 11, 2005, Judge Solis addressed the Petitioner's contentions as set forth in his March 30, 2005 Motion to Amend the Judgment, i.e., that he did not have actual or putative knowledge of his claims until the date of January 8, 2003, or that he had not become aware of the new evidence in his case that presented him with the factual predicates of his claims until that time. **(USCA5, p. 132, 135, 164).** Specifically, the court found Petitioner's March 30, 2005 Motion to Amend Judgment was untimely having been filed more than one month after Judgment was entered dismissing his Sec. 2254 petition on February 22, 2005, and that he had failed to address the issue of newly discovered evidence in his response to the Magistrate Judge's show cause order which he filed on January 18, 2005 or his objections to the magistrate judge's recommendation which he filed on February 17, 2005. The court also found that the Petitioner had failed to provide any explanation for his failure to have researched his issues prior to January 8, 2003, and that mere ignorance of possible grounds for relief was not a

basis for equitable tolling. **(USCA5, p. 165).** The court also specifically found that the United States Constitution does not require that state felony charges be brought by indictment, and that defects under the law do not impinge upon federally protected rights unless the charging document is so defective as to deprive the state court of jurisdiction. It then proceeded to assume in light of the Court of Criminal Appeals denial of the state petition for habeas corpus that the "defective indictment" claim raised by Petitioner was found to be without merit. The court made no findings as to whether Petitioner had notice or constructive knowledge of the AEDPA statute of limitations. **(USCA5, p. 165).**

On May 19, 2005 Petitioner filed his Objection to the Findings and Recommendations made by the Magistrate Judge on May 10, 2005. **(USCA5, p. 166).**

On May 24, 2005, Petitioner filed his Objection/Motion to Review the Merits of the Pleadings. **(USCA5, p. 179-191).** In said Objection the Petitioner argued that his March 30, 2005 Objection/Motion to Amend Judgment was in fact timely filed in that it had been placed in the Ellis Unit's prison mailbox on March 25, 2005 which was within 30 days of the Judgment signed on February 22, 2005 and entered on March 1, 2005. **(USCA5, p. 180).** Additionally, it was argued it was further timely in that the court still maintained jurisdiction over the case as it had entered an additional Order on March 18, 2005. **(USCA5, p. 182).** The Petitioner further objected to the court's findings that he had failed to raise his "newly discovered evidence" claim in his February 17, 2005 response to the Magistrate's show cause order or in his Objection to the Magistrate's findings and recommendation filed on January 18, 2005, or that he had delayed in researching his claims until January 8, 2003, or that he had delayed in filing his state petition for habeas corpus until April 2, 2003. **(USCA5, p. 183).** Finally, Petitioner objected to the court's assumption that the

Texas Court of Criminal Appeal's had dismissed his "defective indictment" claim as having been without merit as he claimed he had in fact proved that the indictment was fatally defective. **(USCA5, p. 183-184).** Petitioner specifically argued that his "defective indictment" claim was dismissed by the Texas Court of Criminal Appeals on the grounds that he did not raise his complaint about the indictment prior to trial, and that such finding was improper as a "fatally defective indictment" claim is a jurisdictional matter which cannot be waived or forfeited. As such, the Texas Court of Criminal Appeals in fact never considered this issue on its merits. **(USCA5, p. 186, 189).** Petitioner further complained that his pleadings should not have been held to the same stringent and rigorous standards as a pleading filed by a licensed lawyer, but in fact should have been liberally construed. **(USCA5, p. 187).**

On May 25, 2005, Judge Solis entered a further Order addressing the Petitioner's May 19, 2005 Objections to the Magistrate Judge's Report and Recommendation of May 10, 2005. **(USCA5, p. 192).** In this order the court acknowledges that Petitioner's primary argument was that there were unresolved disputed material facts pertaining to the underlying claims he asserted in his federal petition for habeas corpus, but that his claims were dismissed as time-barred, and therefore the court would not reach the merits of his claims. The court further found that the magistrate judge had properly determined there were no disputed facts as to the limitations issue, that there was no need to hold a hearing on the limitations issue, and that since the claims are time-barred, there was no reason to hold an evidentiary hearing on the underlying claims. **(USCA5, p. 193).**

On May 27, 2005 the Magistrate Judge entered Findings, Conclusions and Recommendations on Petitioner's Objection/Motion to Review the Merits of the Pleadings of Petitioner" filed on May 24, 2005. In said findings the

magistrate judge again asserted that the underlying merits were barred by the statute of limitations, and that to the extent the Petitioner claimed the court has erred in applying the statute of limitations his remedy is to pursue his appeal from the Judgment entered on March 1, 2005. **(USCA5, p. 196-197).**

Petitioner filed on June 7, 2005 Written Objection to Findings, Conclusions and Recommendation of United States Magistrate in which he urged the District Judge to consider all of his previous pleadings personally without the use of the magistrate's recommendations which he argued were in error. **(USCA5, p. 198-205).**

On June 9, 2005 the District Judge adopted the Findings, Conclusions and Recommendations of the Magistrate Judge as correct, and denied Petitioner's May 245, 2005 Objection/Motion to Review the Merits of the Pleadings of Petitioner. **(USCA5, p. 206).**

Petitioner timely filed his notice of appeal to the Fifth Circuit Court of Appeals. The undersigned counsel was retained by the Petitioner for purposes of filing his Brief in Support of Certificate of Appealability. Due to the illness of the undersigned counsel, several motions for extensions of time to file this brief were sought and granted.

On October 24, 2006 the Court of Appeals upheld the District Court's denial of a COA as time-barred.

STATEMENT OF THE FACTS

I. Underlying Facts of the Conviction.

Petitioner was arrested on May 12, 1998 after he exited an eighteen wheeler truck that had been involved in a chase with the Dallas County police. The vehicle had been stolen the previous night. Petitioner alleged at trial that he did not steal the vehicle, but had been picked up by a white

male known only to him by the name of Bill at approximately 7:40 a.m. on May 12, 1998. Petitioner further alleged that he had been with his girlfriend, Denise Runnels the previous evening until 7:30 a.m. May 12, 1998 when he was dropped off by her at a convenience store and met and came into contact with the actual person who stole the vehicle. Petitioner contends he began partying with Bill and two women in the vehicle and did not know it was stolen until they passed some police officers and Bill started running from the police in the vehicle. During the chase two women exited the vehicle and were temporarily detained by the police, but subsequently let go after obtaining their names and dates of birth.

When the vehicle came to a complete stop in a ditch, both Bill and Petitioner exited the vehicle and ran from the police. Petitioner was caught, Bill was not. Petitioner was charged with the theft of the vehicle and accused of being the driver during the chase. The police reports associated with the case did not mention anyone else, including the two women as being in the vehicle with the Petitioner. After Petitioner's arrest his counsel attempted to obtain information through the District Attorney and the arresting police officers about "Bill" and the two women who had been in the vehicle. The existence of the people was repeatedly denied by the District Attorney and the police, according to the District Attorney. Eventually, Petitioner filed an internal affairs complaint, and as a result of that complaint, he was eventually provided what were purported to be the names and dates of birth of the two women who had been in the vehicle, but the police continued to deny there was another male in the vehicle.

Eventually, the court viewed the internal affairs file in camera to determine if there was any other information regarding the existence of Bill. Neither petitioner nor his counsel was ever allowed to see the Internal Affairs report or

the statements given by the police officers involved.

At the time of trial, the officers denied there was any other male in the vehicle or that they had ever been asked during the internal affairs investigation about another male, and explained their failure to provide the names of the two women in their report and in response to earlier inquiries to the fact that they did not consider them to be suspects. Without the internal affairs report which had been denied to Petitioner's counsel by the court on several occasions, Petitioner was restricted in his ability to impeach the officers' testimony.

Petitioner to date contends he was not present when the vehicle was stolen and did not have any knowledge it was stolen when he entered the vehicle, and that the police officers attempted to hide witnesses, and perjured themselves when denying the fact that there was another male in the vehicle who escaped from the police. To date, Petitioner nor his counsel have been allowed to view the Internal Affairs report or the District Attorney's notes to determine the communications between the police and the District Attorney's office regarding the inquiries into these other individuals presence during the chase. Without this information it is impossible to determine whether Petitioner's conviction is based on perjured testimony of the police testifying for the state, and whether the District Attorney was aware of the police officers' perjured testimony at the time of trial.

Petitioner's claimed constitutional violations arise out of these facts and others leading up to his trial, during his trial and during his appeal process. The specifics of these constitutional claims have not been reached on the merits in the federal habeas corpus petition, and although they were raised in the state court habeas corpus proceeding and an investigation was performed by the court, the aforementioned records were never reviewed or obtained.

II. Facts Relating to Current Appeal on Denial of COA.

The facts relating to the current appeal and denial of the COA by the Fifth Circuit Court of Appeals are not sufficient ly developed in the record. Although the district court gave Petitioner, who was acting pro se, the opportunity to explain why his petition should be considered timely filed, Petitioner only responded by claiming he did not learn of certain facts necessary to his appeal despite due diligence on his part until January 8, 2003 and that he did not know of the filing deadline requirements of the AEDPA until February 11, 2003. He never specifically, provided any facts in support of these contentions, although he did request an evidentiary hearing on this issue which was denied. As such, it is impossible to determine whether Petitioner should have been entitled to have the statute of limitations tolled pursuant to 28 U.S.C. Sec. 2244(d)(1)(B) or (D) or simply under the rules of equitable tolling.

The Court of Appeals should have handled this matter in the same way it handled Egerton v. Cockrell, 334 F.3d 433 (5th Cir. 2003). In that case, the court granted a COA with a limited remand to the district court for a determination of Egerton's knowledge regarding the filing requirements, and the reasons for his being unaware of them if he was not. In that case, it turned out Egerton did not have knowledge of the filing deadlines because he had been restricted by the library access and the materials contained in the library. It was determined the state's failure to provide him with library access and a copy of the AEDPA was state action allowing for the tolling of the statute starting from the date he learned of the filing requirements.

In the instant case, we do not know why Petitioner

contends he did not know of certain facts necessary to his appeal until January 8, 2003 or why he contends he did not know of the filing deadlines of the AEDPA until February 11, 2003. All we know is this is what he alleged in the state habeas corpus proceedings, and that he was denied an evidentiary hearing on this issue.

REASONS FOR GRANTING THE WRIT

By not following its own procedures and law as set forth in Egerton, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"When the district court denies a habeas petition on procedural grounds without reaching prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484-85 (2000). Petitioner contends he meets both of these requirements.

In the instant case, the Petitioner's certificate of appealability was denied on the procedural ground that the Petitioner filed his federal petition for habeas corpus after the one-year statute of limitations set forth in Sec. 2244(d)(1) of the AEDPA. The Petitioner argued in response that he timely filed his federal petition for habeas corpus because he could not file it until his state petition for habeas corpus had been denied. 28 U.S.C. Sec. 2244(d)(2). In response the District Court found that the Petitioner's state petition for habeas corpus did not toll the statute of limitations because it was

itself not filed within the one-year statute of limitations and therefore was also untimely. Petitioner further argued in response that the limitations period should not have begun to run until January 8, 2003; the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. Sec. 2244(d)(1)(D); **(USCA5, p. 136, 183)**. Additionally, Petitioner attempted to argue pursuant to Dunlap v. United States, 250 F.3d 1001, 1008-09 (6th Cir. 2001) that he did not delay in researching his claims or in preparing his state petition for habeas corpus, but despite due diligence he had lacked notice or constructive knowledge of the filing requirements until February 11, 2003. **(USCA5, p. 136-137).** Petitioner also attempted to argue that he did not have actual or putative knowledge of the pertinent facts that started the statute of limitations running until such time. **(USCA5, p. 138).**

Despite Petitioner's attempts to show the court he did not have actual or putative knowledge of the pertinent facts that formed the basis of his claims, and that he did not have notice or constructive notice of the filing requirements, and his attempts to have the District Court hold an evidentiary hearing on these issues, the District Court merely found the Petitioner had failed to set forth facts supporting these contentions. The Petitioner should not have been held to the same stringent or rigorous standards as regarded his pleadings as those filed by a licensed attorney. Bledsoe v. Johnson, 188 F3d 250 (5th Cir. 1999). In fact, the District Court should have "liberally" construed the Petitioner's pleadings as requested by the Petitioner and made further effort to determine the facts upon which the Petitioner was relying in making his tolling arguments. *Id.* It is clear from the Appellant's pleadings as a whole that he was attempting, if not clearly, to explain that he had been in some way deprived of knowledge of pertinent facts and did not have

notice of the filing requirements until January or February of 2003. It is not at all clear that this lack of knowledge was due in any way to his lack of diligence or mere ignorance of the law, and not due to some form of interference by the state, i.e., no access to a library. Without this information, further inquiry of the Petitioner in writing or during an evidentiary hearing should have been conducted to determine the factual basis for these claims prior to the denial of the certificate of appealability.

For these reasons, Petitioner argues herein that reasonable jurists would have found it debatable whether the court had erred in dismissing his petition on the grounds that his claims were barred by the statute of limitations. This is especially true in that the statute of limitations is not a jurisdictional bar to Petitioner's claims, and does not preclude an equitable tolling of the limitations period. Coleman v. Johnson, 184 F.3d 398 (5th Cir. 1999); Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998).

Petitioner would further argue that he has in fact set forth facts upon which jurists of reason could find it debatable as to whether the petition states a valid claim of the denial of a constitutional right. **(USCA5, p. 6-8).** Petitioner has raised a number of claims in both his state and federal petitions for habeas corpus alleging various violations of his due process and equal protection of the laws under the constitution. **(USCA5, p. 6-86).** At least three of these issues were found to be substantial enough by the State District Court to have been listed in an Order Designating Issues. See Ex Parte Lowell Russell Pugh, Jr.; Writ No. W98-47946-I(A); **(USCA5, p. 168).** Specifically, the trial court found the unresolved issues to be as follows: 1) whether the Appellant received ineffective assistance of counsel at the trial court level, 2) whether the prosecuting attorney's engaged in misconduct by withholding exculpatory evidence, and 3) whether the indictment in the

case was fatally defective. **(USCA5, p. 168).** Unfortunately, the necessary records to properly investigate these issues were never obtained or examined as a part of the state habeas corpus petition. These same issues were raised in Petitioner's federal petition for habeas corpus and his memorandum of law. **(USCA5, p. 13, 15, 19).**

Because the District Court dismissed the federal petition for habeas corpus on the grounds that it was not timely filed, it did not reach the merits of any of the Petitioner's 15 stated grounds of claimed constitutional violations. **(USCA5, p. 193).** The District Court did briefly address the issue of whether the indictment had been so fatally defective so as to deprive the state court of jurisdiction, but did not review the matter on its merits. Instead it merely determined that in light of the Court of Criminal Appeals denial of the state petition for habeas corpus, that claim must have been found to be without merit. **(USCA5, p. 165, n. 2).** Petitioner responded by pointing out to the court that the trial court had found in its findings of fact concerning his state petition for habeas corpus that he had waived his complaint regarding his indictment by not raising it prior to trial. **(USCA5, p. 186).** Further he argued that to the extent his indictment was fatally defective this was a jurisdictional matter which cannot be waived or forfeited. Casias v. State, 503 S.W.2d 262 (Cr. App. 1973); **(USCA5, p. 186).** Further, Petitioner complained that the Court of Criminal Appeals denied his state petition without a written order merely relying on the facts as found by the trial court. **(USCA5, p. 189).** As such, Petitioner argues it was error for the District Court to use the "look through doctrine" and assume the denial by the Court of Criminal Appeals was correct on this point. Ylst v. Nunnemaker, 111 S.Ct. 2590, 2595 (1991).

Another one of Petitioner's arguments was that his indictment was fatally defective as a result of its failure to

state on its face "Against the Peace and Dignity of the State", and because it did not state his enhancement paragraph on its face. **(USCA5, p. 13-14).** Such defects have been found to be of substance, and therefore, unconstitutional. Ex Parte Cooper, 589 S.W.2d 130, 131 (Crim. App. 1979); White v. State, 500 S.W.2d 529, 530-531 (Crim. App. 1973).

CONCLUSION

Petitioner, who contends he is innocent of the offense for which he is being held, has raised a number of constitutional violations surrounding the obtaining of his conviction, and has sought relief through the state and federal habeas corpus proceedings. He has been denied the requested evidentiary hearings and has had his federal claim dismissed on the grounds that it was not timely filed. This issue itself, however, is in dispute as there are not sufficient facts before the court to determine whether or not Petitioner was entitled to have the statute of limitations tolled in his case. Petitioner should be entitled to a COA as to the statute of limitations and tolling issues, and should be provided whatever means of discovery necessary to be able to adequately show the court his entitlement to have the statute tolled.

Respectfully submitted,

_____/S/_____
Frank P. Hernandez

APPENDIX 1a

Filed February 8, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOWELL RUSSELL PUGH, JR.,
Petitioner,
VS. No. 3:04-CV-2745-P

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

FINDINGS, CONCLUSIONS, AND
RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Sec. 636(b) and an order of the District Court in implantation thereof, the subject cause has previously been referred to the undersigned United States Magistrate Judge. The findings, conclusion, and recommendations of the Magistrate Judge, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for habeas corpus relief filed by a state inmate pursuant to 28 U.S.C. Sec. 2254.

Parties: Petitioner Lowell Russell Pugh, Jr. ("Pugh" or

"Petitioner") is confined at the Ellis Unit of the Texas Department of Criminal Justice, Correctional Institutions Division ("TDCJ-CID") at Huntsville, Texas. Respondent is the Direct of TDCJ-CID.

Statement of the Case: Pugh pled not guilty in cause number F9847946-TI to the offense of theft of property of value greater than twenty thousand dollars and less than one hundred thousand dollars. The jury found him guilty and he was sentenced to twenty years in the penitentiary.

Petitioner appealed his conviction, which was upheld by the Eighth Court of Appeals on February 14, 2002. *Pugh v. State,* No. 08-00-00068-CR, 2002 WL 221884 (Tex. App. – El Paso Feb. 14, 2002, no pet.)(not selected for publication). Pugh did not file a petition for discretionary review.

On April 2, 2003, Petitioner filed an application for habeas corpus relief pursuant to Tex. Code Crim. Proc. Art. 11.07. It was denied on October 13, 2004. (*See* Pet.'s Resp. to Court's Order in a Case Permitting Proceeding in a Case Pursuant to 28 U.S.C. Sec. 2254, Requiring Petitioner to Show Cause With Respect to Statute of Limitations and Specifying Further Action to be Taken by the Clerk at2-3).

Pugh filed the present habeas petition on November 8, 2004.[1] Process has not been issued in this case. On January 5, 2005 the undersigned filed an order which in pertinent part

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[1] For the purposes of this recommendation, the filing date is the date on which Pugh signed his petition and presumably placed it in the prison mail system. *See Spotville v. Cain,* 149 F.3d 374, 378 (5th Cir. 1998). Although Pugh's petition is signed January 10, 2004, it is apparent that he re-filed the brief he submitted on January 10, 2004 in *Pugh v. Dretke,* No. 3:04-CV-00198 as his brief in this case as well. He has also included what he titled a "28 U.S.C. 2254 [sic] Amendment", which was signed on November 8, 2004, which is therefore the earliest that he could have placed the present petition in the prison mail system. *See, e.g., Roberts v. Cockrell,* 319 F.3d 690, 691 n.2 (5th Cir. 2003).

directed Pugh to show cause why his petition was not barred by limitations, and on January 18, 2005 he filed his response.

Findings and Conclusions: Rule 4, of the Rules Governing Section 2254 Cases in the United States Courts, provides that "[i]f it plainly appears from the face of the petition and any exhibit annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified." Pugh's petition was filed after April 24, 1996 and is therefore subject to the one year statute of limitations under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059 (1977). The statute of limitations may be raised *sua sponte* provided that Pugh has been afforded an opportunity to argue against the limitations issue. *See Kiser v. Johnson,* 163 F.3d 326, 328-29 (5th Cir. 1999).

Petitioner's conviction become final for the purposes of the AEDPA on March 16, 2002, thirty days after the Eighth Court of Appeals affirmed his conviction. *See* Tex. R. App. P. 68.2. Pugh filed his art. 11.07 application on April 2, 2003, more than two weeks after the limitations period had expired. *Egerton v. Cockrell,* 334 F.3d 433, 435 (5th Cir. 2003)(petitioner's art. 11.07 application did not toll the limitations period because it was filed after the one year period). Petitioner's federal petition is thus untimely.[2]

In response to this court's order to show cause, Pugh states that his attorney failed to notify him that his conviction had been decided on appeal. Assuming *arguendo* that his appellate counsel failed to inform him when the Eighth Court of Appeals affirmed his conviction, Pugh has nonetheless failed to demonstrate due diligence in failing to inquire of

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[2] In his response to the court's show cause order Pugh argues that his conviction in F9847946-TI did not become final until he had exhausted avenues of collateral attack. His argument is patently erroneous. *See, e.g., Foreman v. Dretke,* 383 F.3d 336, 338 (5th Cir. 2004).

either his attorney or the clerk of the appellate court as to the status or disposition of his direct appeal on or before March 3, 2003.

RECOMMENDATION:

For the foregoing reasons it is recommended that the district court dismiss the petition as being time barred.[3]

A copy of this recommendation shall be transmitted to the Petitioner.

/S/

Wm. F. Sanderson Jr.
United States Magistrate Judge

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten (10) days after being served with a copy of this recommendation. Pursuant to *Douglas v. United Servs. Auto Ass'n,* 79 F.3d 1415 (5th Cir. 1996)(*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten (10) day period may bar a *de novo* determination by the district judge of any finding of fact and conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

[3] In grounds one and two of his petition Pugh alleges that his parole from a prior unidentified criminal conviction was improperly revoked. As these grounds do not relate to his conviction in F9847946-TI, they are not cognizable in the present petition. *See* Rule 2(d), Rules Governing Section 2254 Cases in the United States District Courts.

APPENDIX 1b

Filed February 22, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOWELL RUSSELL PUGH, JR.,
Petitioner,
VS. No. 3:04-CV-2745-P

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

ORDER

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED, that the findings, conclusions and recommendation of the United States Magistrate Judge are adopted.

SIGNED this 22nd day of February, 2005.

_____/S/_____
Jorge A. Solis
UNITED STATES DISTRICT JUDGE

APPENDIX 1c

Filed February 22, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOWELL RUSSELL PUGH, JR.,
Petitioner,
VS. No. 3:04-CV-2745-P

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

JUDGEMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED AND DECREED that the petition be, and it is hereby, dismissed as being time barred.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this judgment and the order adopting the Findings, Conclusions and Recommendation of the United States Magistrate Judge, to Petitioner.

SIGNED this 22nd day of February, 2005.

/S/

Jorge A. Solis
UNITED STATES DISTRICT COURT

APPENDIX 1d

Filed March 18, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOWELL RUSSELL PUGH, JR.,
Petitioner,
VS. No. 3:04-CV-2745-P

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

ORDER

This is a writ of habeas corpus filed by a state inmate pursuant to 28 U.S.C. § 2254. On February 8, 2005, the magistrate judge filed his Findings and Conclusions recommending dismissal of petitioner's application as time barred. Petitioner filed objections to the magistrate judge's report on February 17, 2005. On February 22, 2005, the court issued an order adopting the Findings and Recommendation of the magistrate judge and issued final judgment dismissing the case as time barred. Final judgment was entered on March 1, 2005.

On March 8, 2005, petitioner filed "Supplemental Written Objections" to the magistrate judge's report. In his supplemental objections, petitioner argues the merits of his

petition and states reasons in an attempt to show that his federal petition should not be considered time barred. Because petitioner's objections were filed within ten days after entry of the courts' judgment, the court treats petitioner's supplemental objections as a motion for new trial pursuant to Federal Rule of Civil Procedure 59(e). *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347, fn.3 (5th Cir. 1991). Petitioner's supplemental objections still do not set forth grounds showing that his federal petition was timely filed and do not set forth grounds for equitable tolling. Petitioner maintains he used due diligence because he filed his federal petition shortly after his state application for habeas corpus was denied. However, petitioner overlooked that his state application for habeas corpus was itself filed after the one year statute of limitations provided for in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Thus, the late filed state application for habeas corpus did not toll the AEDPA statute of limitations, and petitioner's federal petition was also untimely. Finally, petitioner has not shown grounds entitling him to equitable tolling of the statute of limitations.

Petitioner's supplemental objections are denied.

SIGNED this 18th day of March 2005.

/S/

Jorge A. Solis
UNITED STATES DISTRICT JUDGE

APPENDIX 1e

Filed May 10, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOWELL RUSSELL PUGH, JR.,
Petitioner,
VS. No. 3:04-CV-2745-P

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's order of reference filed on April 15, 2005, came on to be considered Petitioner's Appeal/Motion for Evidentiary Hearing to Dispute Factual Claims etc. filed on April 14, 2005, and the magistrate judge finds and recommends as follows:

Insofar as Pugh's pleading relates to his appeal, there is no need to address the same since it operates as a notice of appeal and Pugh has paid the required appellate filing fee.

Insofar as Pugh's pleading seeks an evidentiary hearing, it fails to allege the existence of disputed material facts. Essentially he merely argues that the court erred in dismissing his petition on limitations rather than equitably

tolling the one-year limitation period. See 28 U.S.C. § 2254(d)(1)(A). The remainder of his contentions relate to matters of law, not of fact.

RECOMMENDATION:

It is recommended that Petitioner's motion for an evidentiary hearing be denied.

A copy of this recommendation shall be transmitted to Petitioner.

SIGNED this 10th day of May, 2005.

/S/

WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten (10) days after being served with a copy of this recommendation. Pursuant to *Douglas v. United Servs. Auto Ass'n,* 79 F.3d 1415 (5th Cir. 1996)(*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten (10) day period may bar a *de novo* determination by the district judge of any finding of fact and conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

APPENDIX 1f

Filed May 11, 2005

LOWELL RUSSELL PUGH, JR.,
Petitioner,
VS. No. 3:04-CV-2745-P

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

ORDER

In his Objection/Motion to Amend Judgment filed on March 30, 2005, Pugh claims that the court erred in failing to equitably toll the one-year statute of limitations arguing that he could not have discovered the basis for one of his grounds, i.e., ground 4 – fatally defective indictment in No. F-98-47946-TI prior to January 8, 2003.

In his fourth ground (See petition file stamped December 22, 2004, at page 8) Pugh alleges that the indictment failed to allege "Against the Peace and Dignity of the State." He further alleges that no enhancement paragraphs were set out in the indictment.

Petitioner's March 30, 2005, pleading is untimely filed. As he contends, the court's judgment dismissing his § 2254 petition was entered on February 22, 2005, more than one month previously. It is also pertinent that this claim of "newly discovered evidence" was neither asserted in Pugh's response to the magistrate judge's show cause order which he filed on January 18, 2005, nor in his objections to the

magistrate judge's recommendation which he filed on February 17, 2005.[1]

The requisites of a felony indictment under Texas state law are well established. Pugh provides no explanation for his delay in researching this issue until on or about January 8, 2003. Furthermore, ignorance of possible grounds for relief is not a cognizable basis for equitable tolling. Moreover, it is clear that "armed with this knowledge" Pugh delayed filing his art. 11.07 application until April 2, 2003, during which interim period the one-year limitation period expired.[2]

Signed this 11th day of May, 2005.

/S/

Jorge A. Solis
United States District Judge

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[1]In his February 17, 2005, objection Pugh correctly observes that he was required to exhaust state remedies. However, as previously noted, the one-year limitation period began when his conviction became final, not upon the date on which claims were exhausted in state court. See magistrate judge's recommendation filed on February 8, 2005, page 3, n.

[2]The United States Constitution does not require that state felony charges be brought by indictment. Moreover, defects under state law do not impinge upon federally protected rights unless the charging document is so defective as to deprive the state court of jurisdiction. Although the Respondent has not been directed to respond to Pugh's petition, it may be assumed in light of the Court of Criminal Appeals denial of his art. 11.07 application that his "defective indictment" claim was found to be without merit.

APPENDIX 1g

Filed May 25, 2005

LOWELL RUSSELL PUGH, JR.,
Petitioner,
VS. No. 3:04-CV-2745-P

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

ORDER

This is a writ of habeas corpus case filed by a state inmate pursuant to 28 U.S.C. § 2254. On February 8, 2005, the magistrate judge filed his Findings and Conclusions recommending dismissal of petitioner's application as time barred. Petitioner filed objections to the magistrate judge's report on February 17, 2005. On February 22, 2005, the court issued an order adopting the Findings and Recommendation of the magistrate judge and issued a final judgment dismissing the case as time barred. Final Judgment was entered on March 1, 2005.

The court issued an order on March 18, 2005 denying Pugh's supplemental objections. On April 14, 2005 petitioner filed an Appeal/Motion for Evidentiary Hearing to Dispute Factual Claims, etc. The motion was referred to a United States Magistrate Judge, and the magistrate judge filed his Report and Recommendation on May 10, 2005. Petitioner filed objections to the report on May 19, 2005.

Petitioner's primary argument is that there are unresolved disputed material facts pertaining to the underlying claims he asserts in his section 2254 petition. However, petitioner's claims were dismissed as time-barred. Thus, the court has not, and does not, reach the merits of petitioner's claims. Instead, the magistrate judge properly determined that there are no disputed material facts with respect to the limitations issue. Thus, with respect to the limitations issue, there is no need to hold an evidentiary hearing. Because petitioner's claims are time-barred, the court cannot hold an evidentiary hearing regarding petitioner's underlying claims.

The court adopts the findings, conclusions, and recommendations of the United States Magistrate Judge. Petitioner's motion for evidentiary hearing is denied.

Signed this 25th day of May, 2005.

/S/

Jorge A. Solis
United States District Judge

APPENDIX 1h

Filed May 27, 2005

LOWELL RUSSELL PUGH, JR.,
Petitioner,
VS.
No. 3:04-CV-2745-P

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's order of reference filed on May 25, 2005, came on to be considered Pugh's "Objection Motion to Review the Merits of the Pleadings of Petitioner" filed on May 24, 2005, and the magistrate judge finds and recommends as follows:

In substance Pugh's pleading (1) objects to the District Court's judgment previously filed on the basis that he claims error in the court's application of 28 US.C. § 2244(d)(1) – the one-year limitation provision and the court's refusal to find that the limitation period was subject to equitable tolling in his case, and (2) the court's refusal to address the merits of the grounds asserted in his petition.

The District Court has previously made clear that the limitation period bars merits review of this § 2254 petition. See District Court order filed on May 25, 2005. Further, if Pugh claims that the District Court erred in applying §

2244(d)(1), his remedy, if any, is an appeal from the District Court's judgment filed on March 1, 2005.

RECOMMENDATION:

For the foregoing reasons it is recommended that the District Court deny Pugh's motion.

SIGNED this 27th day of May, 2005.

/S/

WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten (10) days after being served with a copy of this recommendation. Pursuant to *Douglas v. United Servs. Auto Ass'n,* 79 F.3d 1415 (5th Cir. 1996)(*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten (10) day period may bar a *de novo* determination by the district judge of any finding of fact and conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

APPENDIX 1i

Filed June 9, 2005

LOWELL RUSSELL PUGH, JR.,
Petitioner,
VS. No. 3:04-CV-2745-P

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

ORDER

After making the review required by 28 U.S.C. § 636(b), the Court finds that the Findings, Conclusions and Recommendation of the Magistrate Judge are correct, and they are adopted as the findings and conclusions of the Court.

It is further ORDERED that Pugh's "Objection Motion to Review the Merits of the Pleadings of Petitioner" filed on May 24, 2005, is denied.

Signed this 9th day of June, 2005.

/S/
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX 1j

Filed October 24, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10382
USDC No. 3:04-CV-2725

LOWELL RUSSELL PUGH, JR.,
Petitioner-Appellant,

VS.
NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Applebee.

Appeal from the United States District Court
For the Northern District of Texas

ORDER:

Represented by counsel, Lowell Russell Pugh, Jr., Texas prisoner #914785, seeks a certificate of appealability (COA) to appeal the district court's dismissal as time-barred of a pro se 28 U.S.C. Sec. 2254 application challenging Pugh's conviction and 20-year sentence of theft. Pugh does not dispute that his application was facially untimely under 28 U.S.C. Sec. 2244(d)(1)(A), but he argues that the district court should not have dismissed the application without determining whether the limitations period should be

equitably tolled.

Pugh has not shown "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Therefore, his request for a COA is DENIED.

/S/

HAROLD R. DEMOSS, JR.
UNITED STATES CIRCUIT JUDGE